THE INSULAR CASES.

II.

DRED SCOTT *v.* SANDFORD.

THE most glaring case of misconception is in connection with the Dred Scott case. As to this case Mr. Justice Brown says: —

"It must be admitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the chief justice be taken at its full value it is decisive in his favor."

I shall attempt to show that as to the issue here, whether the Constitution is operative in the territories, it is to be "taken at its full value." There was no dissent upon that point. The ways parted when the effect of the Constitution thus operating was considered. Mr. Chief Justice Taney held that the Constitution recognized property in a slave, and protected that property against adverse legislation. On this point Mr. Justice McLean and Mr. Justice Curtis dissented. As to the operation of the Constitution in the territories, Mr. Chief Justice Taney said: —

"It [the government] enters upon it [a territory] with its powers over the citizens strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty."

"The Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved. . . . It has no power of any kind beyond it, and it cannot, when it enters into a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it."

Mr. Justice Wayne and Mr. Justice Grier concurred fully in the opinion of the chief justice. Mr. Justice Nelson expressed no opinion on this question. Mr. Justice Daniel said: —

"Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution [territory or other property clause] a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States." . . .

Mr. Justice Campbell said: —

"I look in vain among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to

the United States, or that they might thereafter acquire. I seek in vain for an enunciation that a consolidated power had been inaugurated, whose subject comprehended an empire and which had no restriction but the discretion of Congress."

Mr. Justice McLean said: —

"No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; . . . This is the limitation of all the Federal powers."

"No implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction."

Mr. Justice Curtis said: —

"If, then, this clause [territory and other property clause] does contain power to legislate respecting the territory, what are the limits of that power? To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

The counsel for Dred Scott made this admission in his argument: "I admit that whether the power of Congress to legislate be given expressly or by implication, it is given with the limitation that it shall be exercised in subordination to the Constitution, and that if it be exercised in violation of any provisions of the Constitution the act would be void." No matter what has happened since the Dred Scott case, a proposition as to which both sides agreed cannot be said to have been impaired.

The Monthly Law Reporter for June, 1857, contains a very able and exhaustive review of the Dred Scott case of fifty-three pages, ascribed to John Lowell and Horace Gray, Jr., Esquires (now Mr. Justice Gray of the United States Supreme Court). The article makes no criticism of the proposition that the Constitution extends to the territories, but concedes it, saying: "In no previous case in the courts has it ever been suggested that the power of Congress to govern the territories was limited in any respect, except by the *express provisions of the Constitution*," and cites with approval Mr. Justice McLean's statement that "the Constitution was formed for our whole country. The expansion or contraction of our territory required no change in the fundamental law." It pronounces the highest encomium upon Mr. Justice McLean's and Mr. Justice Curtis's opinions, saying of the latter that "by the common consent

of the profession and of the public" it was "the strongest, clearest, as well as the most thorough and elaborate of all."

Abraham Lincoln, in his great debate with Douglas, bitterly and savagely attacked the Supreme Court for its decision in the Dred Scott case. He went so far as persistently to charge the majority with having entered into a conspiracy against liberty. He never criticised the proposition that the Constitution controlled Congress in legislating for the territories. He conceded that. In his Galesburg speech he defined his position thus: —

"The essence of the Dred Scott case is compressed into the sentence which I will now read: 'Now as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution.' I repeat it, '**the right of property in a slave is distinctly and expressly affirmed in the Constitution.*'"

The perpetuation of slavery by the Constitution, not the extension of the Constitution to the territories, was in his view the infamy of the Dred Scott case. It was this that made Sumner call the Supreme Court a "barracoon." A base and studious effort outside of the court has been made to show that the theory that the Constitution controls Congress in legislating for the territories is the special property of Calhoun, and if overthrown another nail is driven in the coffin of Calhounism; another clod placed upon the grave of disunion and slavery. It proceeds from insufficient knowledge or pure demagoguism.

Politically, constitutional control was first announced by the Liberty Abolitionist party in 1844, in their platform, in these words: —

"*Resolved*, That the general government has, under the Constitution, no power to establish or continue slavery anywhere, and therefore that all treaties and acts of Congress establishing, continuing, or favoring slavery in the District of Columbia, in the Territory of Florida, or on the high seas, *are unconstitutional*, and all attempts to hold men as property within the limits of exclusive national jurisdiction ought to be prohibited by law."

In 1856, the Democratic party, in its platform, although it made frequent reference to the Constitution and declared that Congress had no power under it to control "the domestic institutions of the several states," took no position on the constitutional limitations on the power of Congress to govern the territories, and in 1860 it expressed no opinion upon this question, but contented itself with

the declaration that "as differences of opinion existed" as to that point, "that the Democratic party will abide by the decision of the Supreme Court of the United States on the questions of constitutional law." They did not deny the principle, but they did not affirm it. On the other hand, in 1856, the Republican party made the operation of the Constitution over the territories an article of party faith, the second plank of their platform being: —

"*Resolved*, That, with our Republican fathers, we hold it to be a self-evident truth that all men are endowed with the inalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal Government were to secure these rights to all persons within its exclusive jurisdiction; that, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that *no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it* for the purpose of establishing slavery in the United States, by positive legislation prohibiting its existence or extension therein; *that we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery* in any territory of the United States while the *present Constitution shall be maintained.*"

Here is an express recognition and reliance upon the proposition that the Constitution controlled Congress in legislating for the territories. In 1860 it denounced the slavery feature of the Dred Scott decision and affirmed its position on the Constitution and territories as follows: —

SECTION 7.

"That the new dogma, — that the Constitution, of its own force, *carries slavery into any or all of the territories of the United States*, — is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country."

SECTION 8.

"That the normal condition of all the territory of the United States is that of freedom; that as our Republican fathers, when they had abolished slavery in all our national territory, ordained that '*no person shall be deprived of life, liberty, or property without due process of law*,' it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this *provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any*

individuals, to give legal existence to slavery in any territory of the United States."

The Republican party upon this platform entered upon and fought its great battle for human liberty. Because it waged a successful warfare it can hardly be said that the principles for which it fought were overthrown in the contest. The Republican party said the Constitution went to the territories, and carried liberty with it. It is immaterial who originally championed the extension of the Constitution to the territories, nor does the fact that it was once prostituted to a base purpose concern us. It has been dedicated to freedom. The Republican party has never by any platform utterance reversed its position on this question. This great principle was jauntily described by Benton as a "vagary." In the light of this history how can it with any propriety be said of the only proposition laid down in the Dred Scott case that is raised here, that "the country did not acquiesce in the opinion, and that the civil war which shortly thereafter followed produced such changes in judicial as well as public sentiment, as to seriously impair the authority of that case"? That may be said of the slavery branch of the proposition, as to which there was an "irrepressible conflict," but not as to a proposition upon which all agreed.

Mr. Justice Brown suggests "that in view of the excited political condition of the country at the time, it is unfortunate that he [Mr. Chief Justice Taney] felt compelled to discuss the question upon the merits," but that does not impair the authority of a principle as to which the contending parties stood on common ground. In any event this is to be said of Mr. Chief Justice Taney's opinion, assuming that it passed upon a question uncalled for by the issue presented, there is nothing in the language of his opinion that indicates it was being rendered for a purpose, that it had in view any political considerations, or allowed any consequences to influence the result. Can as much be said of those who criticise him? In the Dred Scott case, the court worked out from a conceded proposition, indorsed by the Republican party, an erroneous conclusion, utterly repugnant to the enlightened Christian conscience of a free people, in order that the slavery of a race might be made enduring. In the Downes case, a disagreeing court with one majority reverses this admitted principle, emancipates the Congress from the control of the Constitution, in order that a land of vast fertility and great resources, and ten millions of people and millions yet unborn, may be forever subjected to the commercial servitude and the un-

restrained will of the Republic. In this connection I call attention to the fact that Mr. Justice Brown finds it necessary to call again upon the great authority of Webster, the "expounder of the Constitution," and to cite Benton and Clay to buttress his cause.

He quotes Webster as saying, in discussing the proposition to extend the provisions of the Constitution to the territories by act of Congress, that the "scheme" was an "absurdity" and an "impossibility." Yet it is not only now conceded on all hands that it can be done, but it is now claimed that once done it cannot be undone. He further quotes him as saying "that Congress governed the territories independently of the Constitution, and incompatibly with it; that no part of it went to a territory but what Congress chose to send [that is, you could send it piecemeal, but not in bulk]; that it could not of itself act anywhere, not even in the states for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere." This last suggestion would be startling if it did not on a moment's examination appear to be clearly absurd. Note that the assertion is general, and does not discriminate between the provisions of the Constitution conferring powers to be exercised, and imposing restrictions upon the exercise of power. That a power to be exercised is dormant and inoperative even in a state until it is put in operation by an act of Congress, we can understand, but the suggestion that a limitation or restriction upon the exercise of a power (and that is the question here) cannot operate "anywhere, not even in the states," until the body to be restrained sees fit to impose the restraint, is an absurdity that would be monumental if it had not been uttered by Webster. It illustrates the superficial manner in which he discussed the question. An examination of the debate from which the quotation is made shows that Webster's part in it was incidental and impromptu, as all he said does not occupy a page in the Globe. Unmindful of the fact of the distinction between political and civil rights, and that political rights furnish no test of the existence of civil rights, and forgetful that Mr. Chief Justice Marshall in the Loughborough case distinctly overruled that point, he still presses the representative idea as the sole test. He said: —

"The Constitution — what is it? We extend the Constitution of the United States by law to territory. What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the Legislature which it establishes, with not only a right of debate and a right to vote in both

Houses of Congress, but a right to partake in the choice of President and Vice-President?"

It has been discovered by experience that these direful results have not followed from the terrible act of extending the Constitution. As Webster saw the Constitution go out, he could see a United States Senator coming in. Of what special value is his opinion when he thus confuses political privileges and legal rights? He said further in the debate: —

"How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of *habeas corpus* would be lost; undoubtedly these rights must be conferred by law before they can be enjoyed in a territory."

That is, the right of *habeas corpus* does not exist in a territory unless conferred by Congress, if Webster's view was sound. Is the court prepared to hold that the inhabitants of Porto Rico and the Philippines can be arbitrarily restrained of their liberties without form or process of law, and it cannot be inquired into and relieved by *habeas corpus* unless Congress shall have so determined? It is a well-known fact that in at least one instance the powers that be have declined to face that issue. Perhaps nothing can better illustrate the reckless extravagance with which Webster stated legal propositions in this debate than his assertion that the fact that the Constitution did not extend to the territories had been "decided by the United States Court over and over again for the last thirty years," when the fact is that he had been gathered to his fathers nearly forty-nine years before any such decision ever illumined our jurisprudence, and twenty-nine years before he spoke the court had in effect held that it did.

It is unjust to the reputation of this great man to allow it to stand upon the loose and superficial statements in this debate in 1849. His purpose then was, no doubt, to repel the advance of slavery. With the same purpose in view in 1848, he made a great speech against the Mexican war, filling fifteen columns in the Globe, evidently the result of careful preparation. He discussed the precise question involved here, the acquisition of new territory, and the constitutional difficulties involved therein. On that he said: —

"Arbitrary governments may have territories and distant possessions, because arbitrary governments may rule them by different laws and different systems. Russia may rule in the Ukraine and the provinces of

Caucasus and Kamschatka by different codes, ordinances, or ukases. We can do no such thing. They must be of us, *part* of us, or else strangers. I think I see that in progress which will disfigure and deform the Constitution. . . . I think I see a course adopted which is likely to turn the Constitution of the land into a deformed monster, into a curse rather than a blessing; in fact a frame of an unequal government, not founded on popular representation, not founded on equality, but on the grossest inequality, and I think that this process will go on until this Union shall fall to pieces. I resist it to-day and always."

When his attention is concentrated upon the precise issue he does not appear to be of much assistance to the learned Justice. It is not surprising that this 1848 speech appears in his collected works with some slight revision, showing that it had passed under the master's hand, while that of 1849 has been allowed to moulder under the dust of the Congressional Globe.

As to Benton, if we are to be governed by his views, we need give ourselves but little concern, as he starts his examination of the Dred Scott case with the assertion that the questions were "political, affecting Congress in its legislative capacity, and on which the Supreme Court has no right to bind or control that body." It is perhaps enough to say of Mr. Benton that this jurisconsult affirmed Mr. Webster's loose suggestions, saying: —

"In the second place, it cannot operate anywhere, not even in the states for which it was made, without acts of Congress to enforce it. This is true of the Constitution in every particular."

And as he was nothing if not emphatic, in order to be precise, he said: —

"Every part of it is inoperative until put into action by a statute of Congress."

He went even farther, and claimed that it could not be done, saying: —

"And if the Constitution was extended to the territories (which it cannot be)."

A section of an act reading, —

"And be it further enacted, That the Constitution and laws of the United States are hereby extended over and declared to be in force in said territories of California and New Mexico, so far as the same, or any provision thereof, may be applicable," —

he declared to be "of absurd impossibility," when so great has been the increase of light since his day that four of the majority

hold that the Constitution is in force in the territories without the aid of statute so far "as applicable."

For the purpose of showing that he sustained this theory of legislative absolutism, Mr. Clay is quoted in this connection as saying: —

"The idea that, *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is so irreconcilable with my comprehension, or any reason I possess, that I hardly know how to meet it."

This quotation is from Clay's great speech on the compromise measures. An examination of the immediate context will disclose the fact that Clay did not attack the question of the Constitution extending to the territories, but made his whole attack upon that branch of the proposition that held that it "*carried along with it the institution of slavery.*" If this was not clear from the context, if the learned Justice had read three columns more of the speech he would have Mr. Clay stating his position beyond all cavil, and against the Justice's contention. Mr. Clay said: —

"The government of the United States, therefore, possesses all the powers which Mexico possessed over those territories, and the government of the United States can do with reference to them, within, I admit, *certain limits of the Constitution*, whatever Mexico could have done. There are prohibitions upon the powers of Congress within the Constitution, which prohibitions, I admit, must apply to Congress *whenever* it legislates, whether for the old states or the *new territories*," . . . "but within the scope of those prohibitions, and none of them restrain the exercise of the power of Congress upon the subject of slavery, the powers of Congress are coextensive and coequal with the powers of Mexico prior to the cession."

This sounds like Mr. Justice Harlan's learned and patriotic opinion in the Downes case. Clay went further, and specifically referred to the District of Columbia, asserting with reference thereto "that Congress has all power which is not *prohibited by some provision* of the Constitution of the United States." It never occurred to him that Congress was unrestrained by the Constitution anywhere. I do not know that Mr. Clay has ever been charged with being a great constitutional lawyer, but common justice requires that his position when referred to on a great question like this should be stated with reasonable accuracy. It is not perceived how this triumvirate of statesmen give any material aid to the court. Perhaps it would on the whole have been

as well if the learned Justice had observed the correct maxim which he laid down early in the opinion: "The argument of individual legislators is no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts."

There is a line of cases relating to the territories and the District of Columbia,[1] as to some of which Mr. Chief Justice Fuller, in his very able and learned dissenting opinion, accurately says: —

"Many of the later cases were brought from territories over which Congress had professed to 'extend the Constitution,' or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body."

When I indorse this statement as accurate, I am not unmindful of the fact that Mr. Justice Brown states that, "In American Publishing Co. *v.* Fisher, 166 U. S. 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that territory." The opinion in that case was by Mr. Justice Brewer; it is short, and I will quote all the court said on this point: —

"The territorial statute was relied upon as authority for this action. Its validity, therefore, must be determined. Whether the 7th Amendment to the Constitution of the United States, which provides that 'in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved,' operates *ex proprio vigore* to invalidate this statute, may be a matter of dispute.

"But if the 7th Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter."

Now comes the statement of the "ground" upon which the case "was put": —

"Therefore, either the 7th Amendment to the Constitution, or *these*

[1] Some of which are: Webster *v.* Reid, 11 How. 437; Reynolds *v.* United States, 98 U. S. 154; National Bank *v.* Yankton, 101 U. S. 133; The City of Panama, 101 U. S. 453; Callan *v.* Wilson, 127 U. S. 550; McAllister *v.* United States, 141 U. S. 179; Talbott *v.* Silver Bow Co., 139 U. S. 441; American Publishing Co. *v.* Fisher, 166 U. S. 464; Springville *v.* Thomas, 166 U. S. 707; Bauman *v.* Ross, 167 U. S. 548; Thompson *v.* Utah, 170 U. S. 343; Capital Traction Co. *v.* Hof, 174 U. S. 1.

acts of Congress, or all together, secured to every litigant in a common law action in the courts of the territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right."

Legislative Construction.

Practical construction by legislative acts is given great weight, especially by Mr. Justice White in reaching his conclusion. Fairbanks *v.* United States, decided at the same term, where the court held the stamp tax imposed on a foreign bill of lading to be equivalent to a duty on exports and therefore unconstitutional, is an illustration of the uncertainty of the application of this rule. There the "practical construction" was all one way, and began in 1787, sustaining the tax. The court, however, ignored this rule on the ground that it could be "relied upon only in cases of doubt." It will be seen how readily "practical construction" can be eliminated by this rule. Mr. Justice Brown and Mr. Justice Shiras gave it weight in the Downes case, and ignored it in the Fairbanks case. Whatever the practical legislative construction may have been in the exercise of absolutism hitherto, it must be borne in mind that all this legislation has been tentative, and temporary in its character and purpose, preliminary to a regularly organized constitutional government. In case of territories, with the exception perhaps of Alaska, it has always been in contemplation that they would in due time make states. It is perfectly conceivable that Congress, by reason of some supposed exigency incident to the formative period, might adopt temporary legislative expedients of doubtful constitutionality, which they never would think of applying as a permanent rule to conditions expected to continue indefinitely.

Thirteenth Amendment.

A question of supposed constitutional construction requires attention. The Thirteenth Amendment to the Constitution reads: —

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The last clause of this section, "or any place subject to their jurisdiction," is thought to be pregnant with importance. The Attorney General thought it was "most remarkable and signifi-

cant." Mr. Justice Brown thinks it "is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union," and Mr. Justice White called attention "to the Thirteenth Amendment of the Constitution, which," he says, "to my mind seems to be conclusive," . . . and "Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and are hence not within the United States in the completest sense of those words." The question here is what the fathers meant, when in 1787 they used certain language in the Constitution. I shall not stop to elaborate the proposition whether the fact that their children, in 1865, used certain language in connection with the same subject has any legitimate tendency to show what the fathers did or did not mean when they used certain other language seventy-eight years before. It is possible that logic may bridge that chasm, but I should think it doubtful.

It will do no harm to inquire what, if anything, the children meant by the use of this "significant" clause. I have examined the history of that amendment, and I beg to suggest with all due diffidence that *no significance whatever* was attached to its use by those who used it. This amendment was introduced by Hon. J. B. Henderson, then a Senator from Missouri and a slaveholder, on the 11th day of January, 1864, and referred to the Committee on the Judiciary, of which Lyman Trumbull was chairman. It then read: —

"Article I. Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."

On the 10th day of February Mr. Trumbull reported it back from the Judiciary in its present form, making an oral report as follows: —

"The Committee on the Judiciary, to whom were referred various petitions from different parts of the country, praying for an amendment to the Constitution of the United States so as to incorporate a provision prohibiting slavery in all the States and Territories of the Union, and also a joint resolution (S. No. 16) proposing amendments to the Constitution of the United States, and a joint resolution (S. No. 24) to provide for submitting to the several States an amendment of the Constitution of the United States, instructed me to report back an amendment to the Senate of the joint resolution No. 16 in the way of a substitute. I will state that the amendment, as recommended by the Committee on the Judiciary, provides for submitting to the Legislatures of the several States a proposition to amend the Constitution of the United States so that

neither slavery nor involuntary servitude, except as a punishment for crime, whereof a party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction; and also that Congress shall have power to enforce this article by proper legislation. I desire to give notice to the Senate that I shall, at an early day, call for the consideration of this resolution."

No written report appears to have been made; S. No. 16 was the Henderson resolution. It will be observed that Trumbull's report gives no reason for the adding of this clause, and does not refer to it specifically as distinguished from any other clause. I have examined the debate, and not only was absolutely no significance attached to this clause, but I do not even find it referred to. The burden of the debate was whether slavery should be abolished, and practically no attention was paid to the terms of the amendment by which it was to be accomplished. Sumner, it is true, made some verbal criticisms, and suggested several amendments to perfect the language from his view, none of which were adopted. He did not, however, make any reference to this clause. The language of an amendment offered by him February 8, 1864, referred to, and adversely reported by, the Judiciary, negatives the idea that the reason suggested for the use of this clause existed. His amendment read: —

"Everywhere in the limits of the United States, and each State and Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."

Here the words "and each State and Territory thereof" are clearly repeated by way of emphasis, and the fact that the word "territory" is used in the same clause, in the same manner, and for the same purpose as the word "state," makes it evident that a "territory" was as much understood to be within the United States as a "state," and that there was as much occasion for referring to one as to the other. Very few references were made to the amendment in debate. Mr. Harlan put this question: "Ought the Constitution of the United States to be so amended as to abolish slavery, or to prevent the existence of slavery in all the States of the Union?" Mr. Holman said: "You now propose to abolish slavery throughout the United States?" Mr. Thayer stated that the effect of the amendment would be "to prohibit slavery forever within the territory of the United States." Mr. Orth said, after quoting the amendment: "The effect of such amendment will be to prohibit slavery in these United States;" not a word as to a desire to reach territory beyond the limits of

the United States, or the necessity of this "remarkable" clause for that purpose.

Mr. Henderson is still living, vigorous in intellect, and a lawyer of experience and great ability, as well as a man of large affairs. I called his attention to the significance attached to this clause, asking him if he could give me anything from his personal recollection that would throw any light upon this "conclusive" incident. I find he was an intimate friend of Senator Trumbull. I have from him an exceedingly interesting letter, too long for quotation.[1] Among other things he says: —

"Whatever else these words may refer to, they surely were not intended to embrace or refer to the territories of the United States."

So far as anything that was said or done by those who were a part of this history, the clause was apparently used for the purpose suggested by Mr. Chief Justice Fuller in his dissenting opinion, "simply out of abundant caution." When it does not appear that a single individual during that time ever thought specially of, or attached the slightest significance to, this clause, is it not to the last degree improbable that any one of the millions that voted upon the amendment exercised any thought, or had any intention with reference thereto? Yet Mr. Justice Brown suggests that: "Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and 'any place subject to their jurisdiction,'" as though the people had intelligently and purposely passed upon this question and significantly imbedded it in their fundamental law. How can this amendment add anything to the discussion? Still we must concede that much depends upon the point of view. These opinions illustrate this. Mr. Justice Brown says: —

"The decisions of this court upon the subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. [It would be instructive to have these pointed out.] Other cases arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States."

Mr. Justice White says: —

"Let me now proceed to show that the decisions of this court, without a single exception, are absolutely in accord with the true rule as evolved

[1] The letter is printed at the end of this article.

from a correct construction of the Constitution as a matter of first impression and as shown by the history of the government which has been previously epitomized."

"How shall we find the concord of this discord?"

The Consequences Involved.

With the greatest respect for the court, I feel bound to say that it seems to me that the majority justices were too profoundly impressed with the supposed consequences of an adverse decision.

In Mr. Justice McKenna's view, it took "this great country out of the world and shuts it up within itself." Mr. Justice Brown thought: "If such be their status [citizens] the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. . . . Such requirement would bring them at once within our internal revenue system . . . and applying it to territories which have had no experience of this kind, and where it would prove an intolerable burden. . . . Our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests. . . . A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire," and "the question at once arises whether large concessions ought not to be made." And Mr. Justice White thought that if incorporated, "it resulted that the millions of people to whom that treaty related, were, without the consent of the American people, as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country."

What are the direful consequences that inhere in the application of all of the provisions of the Constitution to the territories? I can understand how sugar and tobacco planters, and raisers of tropical fruits, can see "serious" consequences in conditions that might compel them by competition to reduce the price of their goods to the consumer, and hence the importance of being able to discriminate against such competitors. Such consequences, however, would not necessarily be very "serious" to the great mass of our people.

Inasmuch as voting and representation are not elements, what other consequences are there that should be guarded against with such zeal? Is it the competition of cheap labor? We have eman-

cipated millions in our own land without disturbing labor conditions. There were those who thought that upon emancipation "a torrent of black emigration would set forth from the South to the North;" "one of the first results of its emigration would be a depreciation in the price of labor. The added number of laborers would, of itself, occasion this fall of prices, but the limited wants of the negro, which enable him to underwork the white laborer, would tend still further to produce this result. The honest white poor of the North would, therefore, be either thrown out of employment entirely by the black, or forced to descend to an equality with the negro, and work at his reduced prices."

None of these woes have vexed us. The negro cannot be driven out of the South. He has as yet made no injurious competitive industrial development here, surrounded by vast natural resources, and the Filipino is ten thousand miles away. He is vastly the superior of the Filipino physically, and until the Philippines produce a Fred Douglas or a Booker T. Washington, he has nothing to fear in an intellectual comparison. The temporary inconvenience of internal revenue laws seems to me vastly overestimated. Mere inconvenience can hardly determine a constitutional question.

Where is the bugbear? Is citizenship really "extremely serious"? If so, in what particular, and how? The Foraker bill when first reported from the committee contained a provision making the inhabitants of Porto Rico "citizens of the United States." The committee did not seem to be impressed with the "serious" character of that act. They said in their report: —

"The committee have seen fit, by the provisions of this bill, to make them citizens of the United States, not because of any supposed constitutional compulsion, but solely because, in the opinion of the committee, having due regard to the best interests of all concerned, it is deemed *wise* and *safe* to make such a provision."

Again: —

"It was necessary to give these people some definite status. They must be either citizens, aliens, or subjects. We have no subjects, and should not make aliens of our own. It followed that they should be made citizens, as the bill provides."

If, for any reason, the committee had thought it unwise or unsafe, they might have withheld that quality. Apparently we now have "subjects." As to dangers, the court seems to have become possessed of light which was denied to the committee. The committee studied the practical conditions, and it seemed to them

"wise and safe." What has happened to make it so "serious"? Should we not have a specification of the dangers that inhere in giving to "our own" the same civil rights under the Constitution that we possess?

Such are a few of the considerations tending to show that the profession and the country may not feel like unreservedly acquiescing in this decision. The foundation upon which it rests is too insecure to insure permanence. As the needle always turns to the pole, may we not hope that the greatest court in Christendom will in the end determine the law of the land in accordance with correct principles. With such an unerring guide the Republic will achieve its splendid destiny, "conquering and to conquer," enlarging its borders, disseminating the blessing of its civilization, and fulfilling the mission of Him who "hath made of one blood all nations of men, for to dwell on the face of the earth."

Charles E. Littlefield.

WASHINGTON, D. C., June 28, 1901.

HON. C. E. LITTLEFIELD, ROCKLAND, ME.

My Dear Sir, — In reply to yours of the 22d instant, I can give you but little beyond the bare impressions left on my mind by events which occurred over thirty-seven years ago. I am just starting to Bar Harbor for the summer; and I am therefore unable to make the examination of Congressional records and other data necessary for a more satisfactory answer to your questions.

The joint resolution to amend the Constitution abolishing slavery, which afterwards became the 13th amendment, was presented by me on January 11, 1864, and at once referred to the Judiciary Committee of the Senate. The resolution as submitted consisted of two articles, the first of which was intended to abolish slavery throughout the United States, and the second was designed to facilitate or make less difficult, the process of amending the Constitution.

The first article as introduced by me was in these words: —

"ARTICLE I. Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."

On the 10th of February following, the Committee, through its chairman, Mr. Trumbull, reported back the joint resolution, omitting entirely the 2d article, and amending the 1st article to read as follows: —

"SECTION I. Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SEC. II. Congress shall have power to enforce this article by appropriate legislation."

My remembrance is that Mr. Trumbull, and possibly some other members of the Judiciary Committee, while the resolution was before them, indicated to me a desire or purpose to conform the language of the amendment as far as possible to that of the 6th article of the Ordinance of 1787 for the government of the Northwest Territory, which, as you will remember, is in the following words: —

"ARTICLE VI. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."

As slavery was not supposed to exist at all in the Northwest Territory in 1787, the Congress of the Confederation used language, not to abolish slavery, but to prevent its future introduction, to wit, "there *shall* be neither slavery nor involuntary servitude," etc. That slavery existed as a matter of right or of law in the United States in 1864 was disputed by some members of Congress. But that it existed as a matter of fact was hardly to be disputed by anybody. I assume that the Judiciary Committee recognized the actual existence of slavery, and their purpose was to use language proper to terminate its existence on the adoption of the amendment. The change in phraseology is slight, but indicative of the purpose. The language used is, "neither slavery nor involuntary servitude . . . shall *exist* within the United States," etc. In other words, as slavery did *not* exist in the Northwest Territory in 1787, it was enough to say "there shall be" none there in the future. But as slavery *did* exist in the United States in 1864, it was declared that, upon adoption of the amendment, it should no longer exist.

In this desire to conform to the phraseology of the Ordinance of 1787, it followed, of course, that the words, "whereof the party shall have been duly convicted," were inserted. To this change, I, of course, made no objection. If it introduced anything new into the amendment, the new matter was in no way objectionable. If it added nothing of substance to my original resolution, it detracted nothing, and possibly made it less liable to misinterpretation. While clearness of expression is desirable in the framing of laws, brevity is equally desirable provided the language used comprehends the purpose sought. It never entered into my mind, however, that "punishment for crime," under our system of government, could be decreed by any authority other than the duly constituted tribunals of justice.

But the amendment to which you call my special attention is found in the words, "or any place subject to their jurisdiction."

After providing that "neither slavery nor involuntary servitude shall exist in the United States," you properly ask why it was thought necessary to add the words, "or any place subject to their jurisdiction." And in this connection you call my attention to the comments of Justices Brown and White of the Supreme Court in their late opinions in the Porto Rico cases.

The reasoning of these eminent judges is clearly defective, and the difficulties of construction suggested by them would have disappeared with a better knowledge of the history of the amendment and the peculiar circumstances attending its adoption.

Whatever else these words may refer to, they surely were not intended to embrace or refer to the territories of the United States. If the eminent lawyers who composed the Judiciary Committee at that time had intended such a meaning, the term "territory" or "territories" would have been expressly used. It is the language of the original constitution. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the 'territory, or other property,'" etc. The word "territory" had a clear and well-defined meaning before the Federal Constitution was framed. It was constantly used and well understood under the old Confederation of states. The United States inherited "territories;" and the new government accepted the nomenclature attached to them as the convention had crystallized it in the Constitution. It is a term whose definition is as distinctive as any other term or phrase used in that instrument.

In providing for a capital or seat of government, the land to be acquired for that purpose was not called a "territory." It was named a "district;" and that title inheres in all our laws. The sites to be obtained for "forts, magazines, arsenals, dockyards and other needful buildings" were not designated as "territories." They were called "places." And as these places were to belong to the United States, they would necessarily be "subject to their jurisdiction." And in this connection, you will mark the fact that the Judiciary Committee, in framing the constitutional amendment of 1864, used the word "place" — the precise word already used in the Constitution to designate those districts or tracts of land, other than territories, belonging to the United States.

In 1864, let it be remembered, the members of Congress who were called to act on this amendment were fresh from the work of laying taxes of every character — "taxes, duties, imposts, and excises." The whole gamut of taxation, as known to the Constitution, was quite familiar to them all; and it was accepted by all that tax laws, by virtue of general enactment, applied to "territories" as well as states. How could it be otherwise, when each member knew and properly respected the old and revered decision in the Loughborough-Blake case, which had long before defined the term "United States"? That court, through its Chief Justice, had said: "It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territories west of the Missouri, is not less within the United States than Maryland or Pennsylvania."

If we examine contemporaneous history, we find the nation involved at that time in a war of gigantic proportions — blockade runners hovering about our Southern coasts with privileges of shelter in the islands

of the Gulf, and privateers despoiling our commerce, carrying commissions of the Confederate states and carrying, too, the sympathy of European governments.

Among the officers of our army and navy the demand for naval and coaling stations outside the United States and nearer to the rendezvous of these enemies of our national success, was not only general but urgent. The necessity for such stations was equally recognized by the statesmen of the period. So strong was this feeling that Admiral Meade, a short time after, assumed the authority to contract with a Samoan chief for the harbor of Pago Pago; and General Grant, as President, with similar purpose, opened negotiations for island sites in the Gulf of Mexico. In contemplation of such stations, the language of the amendment becomes not only appropriate but necessary. They might be obtained in slaveholding territory. If so, no compact in the covenants of purchase or lease should be allowed to perpetuate the institution. In the language of the Constitution, as it then stood, such stations would not be designated as "territories" but "places." And this latter word was the term naturally to be selected by such lawyers as Trumbull of Illinois, Harris of New York, Howard of Michigan, Foster of Connecticut, and Ten Eyck of New Jersey.

I come now to another view of the subject, then fully realized and felt by all, but not openly discussed by any. I mean the ever-constant fear that after all our sacrifices, foreign intervention or other contingencies might compel either a final separation of the states or a peace on terms looking to the continuance of slavery in some of its forms. With the more pronounced anti-slavery men (especially those of the old Abolition party), the fear of this latter contingency was more dreadful, if possible, than that of dissolution or permanent separation. Among these men there was want of confidence, more or less, in Mr. Lincoln himself. He had already said that he would favor whatever made for the Union. If the Union could be preserved by abolishing slavery, he would destroy slavery. If the Union could only be preserved by retaining slavery, he would accept the hard condition and save the Union.

To statesmen like Mr. Sumner, this was gall and wormwood. They were peculiarly alive to the possibilities of the future. The seceding states might be taken back with their original institutions untouched. If so, the old strife would continue. The roots of dissension would again grow into rebellion and war. These states might possibly be left in a Confederacy to themselves, but in some way subject to a modified jurisdiction of the United States — such as the Balkan states under Turkey, such as the South African Republics under Great Britain, or Cuba under the Platt Resolutions.

It was then universally conceded that if slavery could be once abolished by constitutional provision, it could not be revived by treaties of peace. The Constitution was then supposed to be superior to treaties and laws.

The nation had not then outgrown its own organic law. A treaty in violation of the Constitution would have been denounced even by laymen, as null and void. The Republic in its swelling pride of greatness had not accepted the doctrine that the thing created may be greater than the creator, or that two or more departments of the government might set aside the instrument under which they have their being. But if slavery were securely abolished by constitutional provision, it was believed that its continuance could not be accepted as a condition of peace.

When this amendment was drafted General Grant had not commenced the great campaign against Richmond (he had not even been selected for the work), and General Sherman had not reached Atlanta nor organized his march to the sea. No man could prophesy the end. But whatever else might result, a majority of Union men had reached the hope and purpose that there should be an end of slavery. Perhaps to this intense desire, however crude and imperfect his phraseology, may be attributed the joint resolution of Mr. Sumner, on this subject, introduced into the Senate on February 8, 1864, and afterwards pressed by him as a substitute for the Committee's report. It provided as follows: "Everywhere in the limits of the United States, and of each state and territory thereof, all persons are equal before the law, so that no person can hold another as a slave." If this resolution had become a part of the Constitution, those honorable judges who were puzzled by the language of the 13th amendment as it stands, would have been led into inextricable confusion, in an effort to account for the word "states," after the whole area of the United States had been provided for.

In view of the facts referred to, it is fair to presume the Committee concluded that the words "United States" embraced all the states admitted into the Union and all the territories belonging to the government; and that the phrase "any place subject to their jurisdiction" covered the District of Columbia, the forts, arsenals, dockyards, naval and coaling stations, together with any territory then within the seceded states over which any jurisdiction or authority might result from treaties of peace at the conclusion of the then pending war.

Yours very truly,

J. B. HENDERSON.